Supreme Court, U.S.
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No. 97-1867

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

MICHELLE CISNEROS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MICHELLE CISNEROS

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QUESTION PRESENTED

Does California's "notice-prejudice" rule, which limits claim or notice deadlines in California insurance policies absent a showing of prejudice, "regulate insurance" within the meaning of that term in the ERISA savings clause, § 514(b)?

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STATEMENT OF THE CASE

1. Respondent Michelle Cisneros suffered a work-related back injury in 1988. (3a) As a result of that injury she has been continuously disabled since June 1992. (*Id.*) Cisneros's employer provided long-term disability benefits under an insurance policy issued by petitioner UNUM Life Insurance Company. (2a, 3a) However, Cisneros was not informed by her employer that she was covered by the disability policy until March 1994. (3a, 18a) Cisneros then immediately applied for benefits, but petitioner denied her claim as untimely. (3a)

2. Cisneros filed suit against petitioner in California state court to recover the policy benefits due. (*Id.*) Petitioner removed the case to federal court, and moved to dismiss for failure to state a claim. (*Id.*) The district court treated the motion to dismiss as a motion for summary judgment under Fed. R. Civ. Proc. Rule 12(c), and entered summary judgment in favor of petitioner, ruling that Cisneros's application was untimely. (*Id.*)

3. Cisneros appealed and the Ninth Circuit reversed. The court held Cisneros's application for benefits was not timely under the UNUM policy. (5a) However, the court further held that under California's "notice-prejudice rule," an insured's untimely application for benefits may not necessarily result in a forfeiture of benefits. (7a)

4. As the court explained it, the notice-prejudice rule prevents an insurer from avoiding liability on the basis of untimely notice or submission of proof unless the company can prove that it has sustained actual and substantial prejudice as a result of the delay. (7a) *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.App.4th 715, 15 Cal.Rptr.2d 815, 845 (1993); see also *Clemmer v. Hartford*

Ins. Co., 22 Cal.3d 865, 151 Cal.Rptr. 285, 293-95, 587 P.2d 1098, 1106-07 (1978). (7a)

5. The court agreed with petitioner that the notice-prejudice rule fell within the pre-emptive sweep of § 514(a) of ERISA, but held that the rule was saved from pre-emption by ERISA's savings clause, § 514(b), because the rule was a state law that regulated insurance. (8a)

6. The court based its holding primarily upon this Court's decision in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740-743 (1985). The court read that decision to impose a two-part inquiry into whether a state law[1] "regulates insurance" and is therefore within the scope of the savings clause. The first inquiry is whether the state law can be understood as a law that regulates insurance from the standpoint of common sense. (8a) Second, the court checks its conclusion against three criteria developed in case law interpreting the phrase "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.

7. These three factors were first articulated in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and were summarized by the Court in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)("*Union Labor Life*") in this way:

> "[*R*]*oyal Drug* identified three relevant criteria in determining whether a particular practice is part of the 'business of insurance' exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of

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[1] ERISA's definition of "state law"includes "decisions." § 514 (c)(1) and (2), 29 U.S.C §§ 1144(c)(1) and (2). Hence, "[d]ecisional law that 'regulates insurance' may fall under the savings clause."*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 n.1 (1987).

> transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."

(These three factors are referred to in this brief as the "*Royal Drug* factors.")

8. The Court of Appeals here applied the tests dictated by *Metropolitan Life* in light of four observations about ERISA's pre-emptive scope gleaned from that decision. These were: (a) the ERISA savings clause appears to be drafted to preserve the states' lawmaking power over certain areas that are otherwise within the scope of the pre-emption clause; (b) the Court presumed that Congress did not intend ERISA to pre-empt areas of traditional state regulation; and at least 25 states follow some variation of the notice-prejudice rule; (c) no case authority suggests that laws regulating the content of insurance policies are not laws that regulate insurance; and (d) ERISA's savings clause could produce a lack of uniformity, but any disuniformities were the result of a congressional decision to "save" local insurance regulation. (9a)

9. The Court of Appeals determined that California's notice-prejudice rule met the "common sense" definition of a law that regulated insurance (10a), and also satisfied two of the three *Royal Drug* factors. The court found that the rule was integral to the relationship between the policyholder and the insured because it effectively created a mandatory contract term. (11a) The court also found that the rule applied only to the insurance industry. (*Id.*)

10. The court further found that the notice-prejudice rule did not have the effect of spreading or transferring the

policyholder's risk, and therefore did not satisfy the first *Royal Drug* factor. (11a) The court held that this was not dispositive, however, based on its reading of this Court's decisions in *Metropolitan Life*, *Pilot Life*, and *Union Labor Life*. (12a) The court read these cases to rely on the *Royal Drug* factors as "relevant considerations or guideposts, not separate essential elements of a three-part test that must each be satisfied for a law to escape pre-emption." (12a) The court noted that *Metropolitan Life* referred to the *Royal Drug* factors "only as 'relevant' criteria," 471 U.S. at 743, while the decision in *Pilot Life* described them as "considerations to be weighed." 481 U.S. at 48. (12a) The court further took note of this Court's statement in *Union Labor Life* that, in the context of the McCarran-Ferguson Act, that, "None of these criteria is necessarily determinative in itself . . . ." 458 U.S. at 129. (*Id.)*

11. Based on its reading of this Court's precedents, the court below declined to follow the lead of the Fifth Circuit, which had held that a law that failed to meet the first *Royal Drug* factor, risk spreading, was necessarily pre-empted. *Tingle v. Pacific Mutual Ins. Co.*, 996 F.2d 105, 110 (5th Cir. 1993); *CIGNA Healthplan v. Louisiana*, 82 F.3d 642, 650 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 387 (1996). (11a, 12a)

12. The court below could discern no meaningful distinction under *Metropolitan Life* between a state law deeming all insurance contracts to contain some minimum benefit, and one subjecting the same contracts to a notice-prejudice rule, if the question is whether one law regulates insurance and the other does not. (12a)

13. The court reversed the judgment against Cisneros and remanded the case to the district court with instructions to remand the case to the plan administrator for a finding on

whether the plan had suffered actual prejudice from Cisneros's delay in submitting her claim. (15a)[2]

REASONS FOR DENYING THE WRIT

I. There Is No Split in the Circuits Over Whether the Notice-Prejudice Rule Regulates Insurance

To date, two circuits have considered whether a state's notice-prejudice rule "regulates insurance" and therefore is saved from ERISA pre-emption under § 514(b). One is the decision of the Ninth Circuit below, the other is the decision of District of Columbia Circuit in *O'Connor v. UNUM Life Ins. Co.*, __ F.3d __, 1998 WL 370475 (D.C. Cir. 1998), which was decided after UNUM filed its petition in this case. Both the Ninth Circuit and the District of Columbia Circuit reached the same conclusion: the notice-prejudice rule is a state law that regulates insurance, and is therefore not pre-empted. No other circuit court has reached a contrary conclusion.[3]

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[2] The Court of Appeals first issued its decision in the case below on May 30, 1997. It withdrew that opinion and issued the decision from which petitioner seeks review on January 28, 1998. (1a, 2a)

[3] Nor are there a host of district court decisions on the issue. In *Bogusewski v. Life Ins. Co. Of N. America,* 977 F. Supp. 1357, 1361 (E.D. Wisc. 1997) and in *Community Health Partners, Inc. v. Kentucky*, __ F. Supp. __, 1998 WL 325259 (W.D. Ky. 1998), the courts held that the Wisconsin and Kentucky notice-prejudice rules, respectively, were laws that regulated insurance. The only contrary decisions appear to be two unpublished decisions within the Ninth Circuit, which were either overruled by the decision below, *Legan v. UNUM Life Ins. Co.*, no. C-95-20495 (C.D.Cal. 1996), or directly overruled, *Gentile v. UNUM Life Ins. Co., rev'd,* 142 F.3d 443 (9th Cir. 1998)(table).

In *Nazay v. Miller*, 949 F.2d 1323, 1336 (3rd Cir. 1991), the Third Circuit disapproved of the district court's application of Pennsylvania's notice-prejudice rule in an ERISA case. However, as the District of Columbia Circuit explained in *O'Connor*, *Nazay* "addresses neither the preemption nor savings provisions of ERISA." 1998 WL at *5. *Nazay* is therefore not in direct conflict with the holding of the decision below.

Since the circuits have not split on whether the notice-prejudice rule regulates insurance, the petition is premised on something less important — a disagreement in the details of the analysis used to evaluate whether a state law falls within the scope of the savings clause. As shown below, this disagreement does not necessarily produce different outcomes in similar cases, and thus provides no pressing need for review.

II. There Is No Significant Disagreement In the Circuits Involving The Application of the *Royal Drug* Factors to the ERISA Savings Clause

Petitioner overstates both the extent and significance of any disagreement in the circuits about the method for applying the *Royal Drug* factors in ERISA pre-emption cases. First, the conflict, such as it is, extends to only four circuits, with the three most recent decisions rejecting the approach championed by petitioner here.

The Fifth Circuit held in 1993 that the three *Royal Drug* factors constitute an essential three-part test for determining whether a state law "regulates insurance" for the purposes of ERISA's savings clause, § 514(b).[4] The issue did

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[4] *Tingle v. Pacific Mutual Ins. Co.*, 996 F.2d at 110.

not resurface in the circuits until 1997, when the Sixth and Ninth Circuits held that the three factors had to be considered in combination, and that no one factor, standing alone, was dispositive.[5] After the petition was filed the Court of Appeals for the District of Columbia Circuit in *O'Connor* adopted the Ninth Circuit's view.

Contrary to the petitioner's suggestion, no other circuits have ruled on this issue. Each case the petitioner cites as in conflict with the approach taken by the court below actually held that a state law that failed to satisfy at least two of the three *Royal Drug* factors was pre-empted.[6]

There is even less to the disagreement between the circuits involved than meets the eye. The "split" that petitioners decry applies only to one factor in a multi-factor

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[5] *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 940 (6th Cir. 1997).

[6] In most cases, the parenthetical descriptions of the case holdings supplied by petitioner acknowledge that the state law in question failed at least two of the three *Royal Drug* factors. See Pet. at 7, *citing*, *Insurance Bd. v. Muir*, 819 F.2d 408, 412 (3rd Cir. 1987)(statute fails all three factors); *McMahan v. New England Life Ins. Co.*, 888 F.2d 426, 428-430 (6th Cir. 1989) (two of three factors); *DeBruyne v. Equitable Life Assur. Soc.* 920 F.2d 457, 468-470 (7th Cir. 1990)(same); *Kelly v. Sears, Roebuck & Co.*, 882 F.2d 453, 455-456 (10th Cir. 1989)(two of three factors); *Anschultz v. Connecticut Gen'l Life Ins. Co.*, 850 F.2d 1467, 1468-1469 (11th Cir. 1988) (same).

The list of cases cited at page 7 of the petition also includes *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153-154 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991). Petitioner summarizes the holding of *Brewer* as "state law which fails to transfer risk is pre-empted." (Pet. at 7.) However, the *Brewer* Court also found that the law in question did not relate solely to the insurance industry and conflicted with the substantive provisions of ERISA. 921 F.2d at 153.

test. As a result, it does not necessarily produce different outcomes in similar ERISA pre-emption cases.

For example, in *Tingle* and in *Davies*, both the Fifth and Sixth Circuits considered whether ERISA pre-empted state laws that barred an insurer from rescinding an insurance policy because of false statements made in the application, unless the statements were made with fraudulent intent. The Fifth Circuit held that ERISA pre-empted the statute because it did not transfer risk. 996 F.2d at 110. The Sixth Circuit also held the statute was pre-empted, finding that the statute did not satisfy any of the *Royal Drug* factors. 128 F.3d at 942.

As the cases cited at page 7 of the petition illustrate, most state laws that do not spread risk, and which therefore run afoul of the first *Royal Drug* factor, will also run afoul of the second and third factors, and will therefore be held pre-empted.

Stripped of its hyperbole, the petition asks this Court to resolve a "split" that has taken years to develop, now extends to only four circuits, and which is not necessarily outcome determinative. Given the clear trend against the view espoused by petitioner, the split is likely to heal itself as even more circuits adopt the majority view. As this occurs, the Fifth Circuit may choose to reconsider its already isolated position.

III. The Decision Below Is Fully Consistent With This Court's ERISA and McCarran-Ferguson Act Decisions Applying the *Royal Drug* Factors

What is missing from the petition is any explanation of why, exactly, the Ninth Circuit's holding was wrong, beyond the fact that it disagreed with the Fifth Circuit. The only aspect of the judgment challenged in the petition is its holding that a state law can "regulate insurance" under ERISA even if it does not satisfy the first *Royal Drug* factor. Yet, this conclusion follows directly from this Court's decisions construing the ERISA savings clause, as well as those construing the McCarran-Ferguson Act, on which the ERISA decisions partially rely.

First, nothing in *Metropolitan Life* or *Pilot Life* suggests that a state law must transfer risk to regulate insurance. In fact, the Court expressly notes in *Metropolitan Life* that state laws that regulate insurance include laws that govern the solvency of insurers, the qualification of management, and those requiring grace periods or conversion privileges. 471 U.S. at 728 n.2. These laws do not spread risk.

Metropolitan Life never proposed that the *Royal Drug* factors be used as a rigid three-part test that would supplant its reliance on a common sense view. Rather, the *Royal Drug* factors were employed to refute the insurer's argument that the state's mandated-benefit law was not the type of "traditional" insurance law that Congress intended to save from pre-emption. 471 U.S. at 741-743. The Court used the factors to explain that the law fit within its test for the "business of insurance" under the McCarran-Ferguson Act, and therefore plainly was a law that regulated insurance. *Id.*

The decisions in *Pilot Life* and *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) support this view. *Pilot Life* refers to the *Royal Drug* factors as considerations to be "weighed." 481 U.S. at 49. In *Pilot Life* the Court considered all three factors, even after first finding that the state law in question did not spread risk. 481 U.S. at 50-51. This is inconsistent with a view that risk spreading is a necessary condition under the savings clause.

In *Holliday,* the Court held that Pennsylvania's anti-subrogation law was pre-empted by ERISA by operation of the "deemer" clause. The Court noted first, however, that the statute was otherwise within the scope of the "savings" clause, *i.e.*, it was a law that "regulated insurance." The law in *Holliday* did not spread risk — it merely prevented insurance plans from obtaining reimbursement of claims paid to a claimant from the claimant's tort recovery. 498 U.S. at 55. Nevertheless, the Court had no trouble finding that it regulated insurance, stating, "It does not merely have an impact on the insurance industry; it is aimed at it." *Id.* at 61.

Ultimately, the Court's decisions construing the McCarran-Ferguson Act resolve the issue. First, in *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), the Court construed the Act's reference to a state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). The Court explained that the focus of the term was on the relationship between the policyholder and the company, and that "statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.' " 393 U.S. at 460. *Metropolitan Life* relied on this language. 471 U.S. at 744.

Under *National Securities*, California's notice-prejudice rule plainly regulates insurance because it speaks

directly to the insured-insurer relationship, effectively mandating a term in the insurance contract — a term that can directly affect when and whether benefits must be paid.

The decisions in *Royal Drug* and *Union Labor Life* addressed a slightly different aspect of the Act, whether a particular business practice constituted the "business of insurance" and was therefore exempt from antitrust regulation under § 2(b) of the Act. Discussing its earlier decision in *Royal Drug*, the Court in *Union Labor Life* explained how the three factors should be applied:

> "[R]oyal Drug identified three criteria relevant in determining whether a particular practice is part of the 'business of insurance' exempted from the antitrust laws by § 2(b). [describing factors] None of these criteria is necessarily determinative in itself, but examining the arrangement between petitioners . . . with respect to all three criteria, we do not hesitate to conclude that it is not part of the 'business of insurance." 458 U.S. at 129 (emphasis added.)

There is nothing in any of the Court's decisions since it made this statement, whether construing ERISA or the McCarren-Ferguson Act, that suggests that it was inaccurate when made or no longer represents the Court's view. The fact that the last three circuits to have considered the question have concluded that none of the three factors is necessarily determinative illustrates that there is no need for the Court to revisit what is already clear.

IV. No Aspect of the Judgment Below Conflicts with Any Substantive Provision in ERISA

Point III of the Petition suggests that the decision below conflicts with ERISA's civil enforcement provisions and therefore attempts to circumvent *Pilot Life*. (Pet. at 14-16) Points II and IV suggest that the decision conflicts with ERISA because it permits the alteration of the terms of the plan, which disrupts the uniformity of law intended by Congress (Pet. at 8-13 and 17-22). There is no conflict.

All of petitioner's arguments are variants on the same theme — that enforcement of the notice-prejudice rule alters the terms of petitioner's plan, creating a conflict with the provisions in ERISA stating that the plan should be enforced or administered according to its terms.[7] This argument ignores the effect of the savings clause, which permits states to dictate or alter the terms of the insurance that plans may provide.

Petitioner concedes that the provisions in ERISA it cites require the administration or enforcement of the plan in accordance with its terms as long as the terms are consistent with the provisions of ERISA. Pet. at 10. The savings clause is as much a part of ERISA as any other part. In it, Congress permitted the states to continue in their historic role of regulating insurance. *Metropolitan Life*, 471 U.S. at 744, n.21.

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[7] *See, e.g.*, 404(a)(1)(D) ". . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV." 29 U.S.C. § 1104(a)(1)(D).

In *Metropolitan Life* the Court acknowledged that a mandated-benefit law could either mandate that all policies contain certain terms, or simply require coverage in certain situations irrespective of what the contract may say.[8] California's notice prejudice rule falls into the second category. For the purposes of the savings clause it does not matter which route a state law employs to achieve its objective.

As for the disuniformities that result from forcing insured ERISA plans to conform to state laws that regulate insurance, "[s]uch disuniformities . . . are the inevitable result of the congressional decision to 'save' local insurance regulation." *Metropolitan Life*, 471 U.S. at 747. Given the savings clause, petitioner cannot fault the Court of Appeals for applying a California law regulating an insured plan in California.

V. The Decision Below Is Interlocutory

The court below remanded the case to the district court with instructions to remand to the plan administrator to determine whether petitioner suffered actual prejudice because Cisneros's claim was late. Petitioner therefore seeks review of the application of a rule that may not affect the ultimate outcome of this case.

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[8] To illustrate the latter type of law the Court explained that, "[T]he majority of states currently require that coverage for dependents continue beyond any contractually imposed age limitation when the dependent is incapable of self-sustaining employment because of mental or physical handicap." 471 U.S. at 729.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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